Supreme Court, U.S.
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No. 98-1827

In The

Supreme Court of the United States

BEATRICE M. HUNT,

Petitioner,

v.

ANDREW M. HUNT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Hampshire

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Statement of the Case 1

A. Procedural History 1

B. Petitioner Does Not Accurately Describe the Proceedings Below 4

Reasons for Denying Petition 8

A. Overwhelming and Uncontroverted Evidence at the Final Hearing Established That a Grant of Sole Legal Custody to Respondent Would Serve The Best Interests of the Child 8

B. The Fourteenth Amendment Does Not Require "Affirmative and Specific Finding" That Child's Welfare Was Jeopardized To Support an Award of Sole Legal Custody 10

Conclusion 14

TABLE OF AUTHORITIES

Page

CASES CITED:

Bodwell v. Brooks, 141 N.H. 508, 686 A.2d 1179 (1996) 8

Del Pozzo v. Del Pozzo, 113 N.H. 436, 309 A.2d 151 (1973) 9

LeClair v. LeClair, 137 N.H. 213, 624 A.2d 1350 (1993) 9

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 11

Palmore v. Sidoti, 466 U.S. 429 (1984) 12, 13, 15

Place v. Place, 129 N.H. 252, 525 A.2d 704 (1987) 9

Reno v. Flores, 507 U.S. 292 (1993) 12

Santosky v. Kramer, 455 U.S. 745 (1982) 13

STATUTES CITED:

N.H. RSA 141-C:20-a 5

N.H. RSA 458:17 ..... 8, 9

STATEMENT OF THE CASE

A. Procedural History

This marital matter dates back to September 23, 1994 when Respondent herein, Andrew Hunt, filed a petition in the Superior Court for the County of Rockingham, New Hampshire requesting a legal separation and an ex parte petition for custody of the parties' minor child. The parties physically separated in October 1993, at which time Petitioner had primary physical custody of the child. Respondent filed his ex parte petition for custody on the basis that the child's health and safety were in jeopardy while in Petitioner's custody.

By order dated September 23, 1994, the superior court granted the ex parte petition and awarded Respondent the temporary physical custody of the child, with reasonable visitation rights to Petitioner. At the time, the parties' minor child, Edward, was four years old. Since that date, Petitioner has refused to visit or communicate with the child in any manner. She has not telephoned him, she has not written him, she has sent him no gifts or birthday cards. She has not communicated with the child in any way although claiming residence in the same town as Respondent, Salem, New Hampshire. The child is now nine years old.

The court appointed a guardian ad litem early in the proceedings, and the guardian encouraged visitation of the child by Petitioner. She refused. The guardian went so far as to file a motion, assented to by Respondent, requesting the superior court to enforce visitation by

Petitioner. The court ruled that it could not order Petitioner to visit the child, but the court expressly encouraged Petitioner to visit with the child. She has refused to do so.

On January 23, 1995, Respondent amended his original petition for legal separation to a Libel for Divorce. For the next two and one-half years, Petitioner used every delay tactic imaginable to prolong these proceedings and avoid a final hearing on the libel for divorce. She frequently changed counsel, and with each change came further enlargements of time, further postponements of hearings, and further obstacles to discovery. Petitioner consistently refused to participate in any meaningful discovery, and the superior court record is replete with reprimands by the court. Despite two express court orders requiring Petitioner to submit to an independent psychological examination, she refused to do so.

After enduring years of delay and frustration brought on by Petitioner's tactics, the final hearing in the Rockingham County Superior Court began on August 4, 1997, before Peter Bourque, Marital Master. At the four-day hearing, Respondent introduced overwhelming and uncontroverted evidence establishing that the best interests of the child would be served by a grant of sole legal and physical custody to Respondent. For example, Kathleen Barber, a nurse-psychotherapist who counseled Petitioner, recalled occasions when she feared that Petitioner would either kill herself or harm the child. She indicated that the child's own pediatrician had also been concerned that the Petitioner would harm the child. Janice Carney, a caretaker, testified that while in the Petitioner's custody, the child "was often disheveled, often

wore the same, or dirty clothes." She described Petitioner as a "very confused individual" who had "serious mental illnesses."

Another caretaker, Catherine Olson, described Petitioner's rages of anger that would last for months at a time. She testified that Petitioner was "the most irrational woman I have spent that amount of time with." Ms. Olson explained that because Petitioner infrequently bathed the child, she would occasionally sneak the child upstairs in the house and bathe him. Gale Hunt, Plaintiff's sister-in-law, recalled receiving a telephone call from Petitioner's family doctor, in which the doctor relayed his concern that Petitioner was in a very agitated state driving around in her car. The doctor was concerned that Petitioner was suicidal and that the minor child was with the Petitioner.

Moreover, the guardian ad litem testified that he recommended that the court grant sole legal and physical custody to Respondent. In contrast to the evidence introduced by Respondent and the guardian ad litem's testimony, Petitioner at times refused to participate in the proceedings, left the courtroom during much of Respondent's case, refused to take the stand when called by Respondent, and ultimately, declined to put on a case.

The superior court issued its final decree on October 21, 1997, whereby it granted sole physical and legal custody of the parties' child to Respondent. The court incorporated certain requested findings of facts into the decree. For example, the trial court found that Petitioner refused to allow the parties' minor child to be immunized against communicable diseases such as polio and tetanus.

(*App. A*, Findings of Fact, No. 43). The court also found that Petitioner had not attempted to visit or communicate with the child for over three years, despite the fact that she lived approximately two miles from him. (*App. A.*, Findings of Fact, No. 55). In addition to numerous findings of fact supporting a grant of sole legal custody, the court expressly stated in its decree that it was awarding sole legal custody to Respondent because Petitioner had chosen not to visit with the child for three years. The court ordered that it is at Petitioner's discretion to seek to resume visitation with the child in the future. If she seeks visitation in the future, she must first file a petition with the court and she would first have to undergo a psychological evaluation as directed by the guardian-ad-litem. (*App. B.*, Final Decree, ¶ 3). Upon the final decree's issuance, Petitioner appealed to the New Hampshire Supreme Court, which summarily affirmed the decree. The current Petition to this Court followed.

B. Petitioner Does Not Accurately Describe the Proceedings Below

In her Petition for Writ of Certiorari, Petitioner mischaracterizes the evidence produced at the four-day final hearing. Petitioner glosses over the fact that she refused to take the stand when called as a witness, and that she remained outside the courtroom during most of the hearing (despite being pro se). She ultimately declined to put on a case. Most importantly, her current Petition fails to explain that the trial court heard overwhelming and uncontroverted evidence supporting a decree of sole physical and legal custody to Respondent.

In addition to his own testimony, Respondent introduced testimony from a relative, various live-in nannies and caretakers, and the guardian ad litem. The testimony consistently focused on Petitioner's frequently bizarre and irrational behavior and many of the witnesses expressed their prior concerns for the child's welfare when the child was in Petitioner's custody.

The trial court's findings of fact reflected the testimony. The court found that since Respondent had been granted temporary physical custody of the child on September 23, 1994, Petitioner had not attempted to visit the child nor had she attempted to contact him in writing, via telephone or by any other means. (*App. A.*, Findings of Fact, No. 55). The court further found that when the child had been in Petitioner's care, the child was often dirty and unkempt. (*App. A.*, Findings of Fact, No. 48). The court found that on one occasion, the parties' family physician called a relative and voiced his concerns that Petitioner was driving in the car with the child and that he believed Petitioner may have been suicidal. (*App. A.* Findings of Fact, No. 51).

The court also found that Petitioner believed only in homeopathic remedies rather than any form of allopathic medicine. (*App. A.* Findings of Fact, No. 38). She refused to allow the child to be immunized against potentially lethal communicable diseases such as polio and tetanus, despite New Hampshire's law requiring children to be immunized before entering school. *See* N.H. RSA 141-C:20-a (*App. A.* Findings of Fact, No. 43). The court found that Petitioner disregarded an earlier court order requiring her to undergo an independent psychological examination. (*App. A.* Findings of Fact, No. 63). The guardian

ad litem also testified about his three-year investigation of the parties and offered his recommendation that Respondent be awarded sole physical and legal custody of the child.

Instead of including a discussion of the trial court's finding of facts, Petitioner misconstrues the evidence that was introduced. For instance, Petitioner claims that the trial court "twice decreed, in one instance after a day-long evidentiary hearing including expert medical testimony, that such use of sole legal custody would be inappropriate, and that sole legal custody should be granted, if at all, upon grounds independent of immunization, given the fundamental parental interests involved." (*See* Petition, p. 13).

Petitioner is referring to an earlier ruling that occurred during the "temporary stage" of the divorce proceedings over two years prior to the final hearing, and Petitioner mischaracterizes the court's ruling. Early in 1995, the guardian ad litem filed a motion requesting that the court order immunization of the child in accordance with New Hampshire law. After a hearing, the court denied the motion for immunization on the basis that at the temporary stages of the matter it would be inappropriate to grant the authority to one parent or another to have the child immunized. The court explained:

> This Court does not have authority to order immunization of the minor child. *The dispute that has arisen with respect to this issue, clearly demonstrates that a final order of joint legal custody may not be in the child's best interests. Parties who are unable to agree on such a basic need with respect for their children, are not prime candidates for such an*

> *order.* The Court does have the power to grant the authority to one parent to have the child immunized. However, since these proceedings are in the "temporary" stages, the Court does not agree that it is in the child's best interest at this time to grant that authority to one party or to the other. Consequently, the motion to have the child immunized is denied. Either party may raise this issue with respect to his or her case regarding legal custody of the minor child.

(*App. C.*, Court Order dated 4/5/95) (emphasis added). So indeed, the superior court was not willing to grant sole legal custody during the temporary stages of the proceedings, but even in the temporary stages the court undoubtedly suggested in its order that joint legal custody would not serve the best interests of the child. And after a final hearing on all the evidence, the trial court granted sole legal custody. But the trial court did not, as the Petitioner unfairly suggests, ignore any evidence. The evidence was overwhelmingly in favor of the Respondent being granted sole legal custody. Additionally, Petitioner refused to take the stand and did not introduce any evidence at the final hearing.

REASONS FOR DENYING PETITION

A. Overwhelming and Uncontroverted Evidence at the Final Hearing Established That a Grant of Sole Legal Custody to Respondent Would Serve The Best Interests of the Child.

New Hampshire superior courts have statutory authority to make legal and physical custody determinations. *Bodwell v. Brooks*, 141 N.H. 508, 512, 686 A.2d 1179, 1182 (1996). New Hampshire law provides that "[i]n all cases where there shall be a decree of divorce or nullity, the court shall make such further decree in relation to the support, education, and custody of the children as shall be most conducive to their benefit and may order a reasonable provision for their support and education." N.H. RSA 458:17. The statute further states:

> II. Except as provided in subparagraph (c), in the making of any order relative to such custody there shall be a presumption, affecting the burden of proof, that joint legal custody is in the best interest of the minor children:
>
> . . .
>
> (b) Upon the application of either parent for joint legal custody, in which case it may be awarded in the discretion of the court. For the purpose of assisting the court in making a determination whether an award of joint legal custody is appropriate under this section, the court may appoint a guardian ad litem to represent the interests of the children according to RSA 458:17-a. If the court declines to enter an order awarding joint legal custody, the court shall state in its decision the reasons for denial of an award of joint legal custody.

In accordance with N.H. RSA 458:17, courts apply the "bests interests of the child" standard to make custody determinations. *Place v. Place*, 129 N.H. 252, 260, 525 A.2d 704, 709 (1987). Under this standard there is no specific formula, but rather courts will consider all the pertinent facts particular to each case, *Del Pozzo v. Del Pozzo*, 113 N.H. 436, 437, 309 A.2d 151, 152 (1973), and trial courts enjoy broad discretion in making custody decisions. *LeClair v. LeClair*, 137 N.H. 213, 217, 624 A.2d 1350, 1353 (1993).

As discussed above, Respondent introduced overwhelming evidence at the final hearing establishing that a grant of sole legal custody would serve the best interests of the child. In accordance with RSA 458:17, the court in the final decree provided a reason for granting sole legal custody, namely that Petitioner had refused to visit or communicate with the child for three years prior to the final hearing. (*App. B.*, Final Decree, ¶ 2). Further in accordance with RSA 458:17, the court appointed a guardian ad litem to determine what custody arrangement was in the best interests of the child. *See Place*, 129 N.H. at 256, 525 A.2d at 706 (explaining that "[t]he guardian ad litem is primarily an advocate for the best interests of the child and also assists the court and the parties in reaching a prompt and fair determination.") The guardian ad litem testified about his lengthy investigation and recommended that the court award sole legal and physical custody to Respondent.

The evidence established that an award of sole legal custody would be the only appropriate award to serve the best interests of the child. In addition to Petitioner's abandonment of the child, the court heard testimony

from various witnesses expressing their concerns for the child's welfare when in Petitioner's custody. The child had not been immunized at Petitioner's insistence. The court found that Petitioner was involved with the Marian Movement of Priests and repeatedly professed her belief that "we are in the end times." (*App. A.*, Findings of Fact, No. 42). Although the court attempted to determine Petitioner's mental stability by requiring an independent psychological examination, she refused to submit to the examination. (*App. A.* Findings of Fact, No. 63).

In sum, the trial court had statutory authority to award sole legal custody of the parties' child to Respondent if such an award would further the best interests of the child. The undisputed evidence established that sole legal custody would serve the best interests of the child, and there is no basis for overturning the trial court's decision.

B. The Fourteenth Amendment Does Not Require "Affirmative and Specific Finding" That Child's Welfare Was Jeopardized To Support an Award of Sole Legal Custody

Petitioner relies on the Fourteenth Amendment's protection of an individual's freedom of choice in family life matters to argue that a grant of sole legal custody of a couple's child must be based on "an affirmative and specific finding" that the child's welfare would be jeopardized by joint legal custody. Because the trial court based the award on its finding that Petitioner had chosen not to visit or communicate with the child for three years prior to the final hearing, Petitioner argues that the grant of sole legal custody violates the Fourteenth Amendment.

The United State Supreme Court has never required such a finding in custody matters, and there is no precedent that would suggest that the Fourteenth Amendment requires such a finding.

Petitioner cites to various cases from this Court in support of her argument, but none of the cases addresses directly the issue of a court's award of custody, and none of the cases suggests that a court must find a child's welfare to be in jeopardy before making an award of sole legal custody. Instead, Petitioner's argument relies erroneously on cases in which a state has terminated a natural parent's parental rights. For instance, Petitioner cites to *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), in which the Court addressed a Mississippi court's permanent termination of a mother's parental rights over her two minor children. Mississippi's Supreme Court declined the mother's request to file an appeal *in forma pauperis*. This Court recognized that the Fourteenth Amendment protects the interests of parents in their relationship with their children, and ultimately held that the Mississippi Court's refusal to allow the appeal based on the mother's inability to afford the appeal violated both the Equal Protection and Due Process clauses of the Fourteenth Amendment. *Id.* at 128.

M.L.B. did not involve a custody determination and, in fact, the court distinguished parental termination cases from custody determinations. The Court emphasized that a termination decree is final and irrevocable and that few forms of state action "are both so severe and so irreversible." *Id.* at 118 (quotations and citations omitted). The Court further emphasized: "*In contrast to loss of custody,* which does not sever the parent-child bond, parental

status termination is irretrievably destructive of the most fundamental relationship." *Id.* at 121 (quotations and citations omitted).

In the case at bar, Petitioner's parental rights have not been permanently terminated, as Petitioner suggests in her brief. She has lost physical and legal custody, but the trial court expressly specified the steps Petitioner could take to resume visitation with the child. Moreover, New Hampshire law allows Petitioner to move the superior court to modify its earlier decree of custody in the future. In fact, Petitioner has already petitioned to have the decree of sole legal custody modified. (The petition was dismissed for failure to raise any changed circumstances, and the petition is currently pending on appeal before the New Hampshire Supreme Court).

Furthermore, this Court has recognized the propriety of the "best interests of the child" standard in making custody decisions. *Reno v. Flores*, 507 U.S. 292 (1993), involved a challenge to an Immigration and Naturalization Service regulation related to the release of detained alien juveniles. The case did not involve a custody matter, but the Court noted that: " 'The best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody." *Id.* at 303-304. The Court did not suggest in *Flores* that courts must find a child's welfare to be in jeopardy before awarding sole custody to one parent. This Court has further recognized that protecting the best interests of the child in custody decisions is a substantial government interest. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Court explained: "In common with most

states, Florida law mandates that custody determinations be made in the best interests of the children involved. The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." *Id.* at 433.

Petitioner also relies on *Santosky v. Kramer*, 455 U.S. 745 (1982), another case involving the permanent termination of parental rights. In *Santosky*, the Court overturned a New York state court's termination of parental rights based on a "fair preponderance of the evidence" that the parents had permanently neglected their children. This Court held that before a state may sever completely and irrevocably the rights of parents in their natural child, the Due Process Clause of the Fourteenth Amendment requires that the state support its allegations by at least clear and convincing evidence. *Id.* at 769-70. Once again, that case did not involve a custody determination, but an irreversible and irrevocable termination of a couple's parental rights. That is not the case at bar and Petitioner's reliance on *Santosky* is misplaced. (It is interesting to note that even in parental rights termination cases, the court requires only a finding of permanent neglect, but not a finding of jeopardized welfare).

The superior court recognized early in these proceedings that joint legal custody is not appropriate in this case. The court pointed to the parties' inability to agree on basic needs for the child. (*App. C.*, Court Order dated 4/5/95). At the final hearing, the trial court found that Petitioner would not allow the child to be immunized in accordance with New Hampshire law, leaving the child vulnerable to potentially fatal diseases. Petitioner has espoused homeopathic remedies and has refused to agree

to any medical treatment proposed by Respondent. The guardian ad litem testified that Petitioner would not agree with any of the psychological counselors suggested by the guardian and eventually the court had to choose one.

In sum, the evidence established that the parties could not agree on any decisions that are fundamental to legal custody. Coupled with the fact that Petitioner had not visited or communicated with the child for three years, the court's award of sole legal custody was the only appropriate award to protect the best interests of the child. If courts were required to make a specific finding that a child's welfare was in jeopardy before making sole custody awards, there would be many joint custody awards that would fail to protect the best interests of children because the parents could not agree on crucial decisions that come with custody of children. Although the court did not make a specific finding that the child's welfare would be jeopardized if joint legal custody were maintained, the evidence supported such a determination. New Hampshire requires that custody determinations be made to further the best interests of the child, and the trial court's award of sole legal custody to Respondent undoubtedly does that.

CONCLUSION

On the whole, courts in New Hampshire and across the country make custody decisions based on the best interests of the children involved. This Court has recognized that standard and has never suggested that sole

custody determinations must be based on findings that the child's welfare would be jeopardized if joint custody were maintained. Trial courts must consider all the evidence and determine how the interests of the children will best be served, and the trial courts are best suited for making that determination. In fact, this Court has noted that "[t]he judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court." *Palmore*, 466 U.S. at 431. This case is not a candidate for review by this Court, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

Andrew M. Hunt

v.

Beatrice Juvanon DuVachat Hunt

No. 94-M-01624

PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW

NOW COMES Andrew M. Hunt, the Plaintiff in the above-entitled action, and submits the following proposed findings of fact and rulings of law.

I. **Findings of Fact**

[The following excerpted Findings of Fact were expressly incorporated into the Final Decree]

. . .

38. Beatrice Hunt believes solely in homeopathic remedies rather than any form of allopathic medicine.

39. Because Beatrice Hunt believed solely in homeopathic remedies, she refused to allow Andrew Hunt to have hernia surgery.

40. After suffering with the hernia for 1 to 1½ years, Andrew Hunt defied Beatrice Hunt and underwent a hernia operation in April, 1990.

41. Beatrice Hunt likened Andrew Hunt's hernia operation to adultery, and she demanded he shower or make love with his boxer shorts on to cover the scar.

42. Beatrice Hunt is involved with the Marian Movement of Priests and Beatrice believes and professed many times that we are in the end times.

43. Beatrice Hunt refused to allow the parties minor child, Edward, to be immunized for communicable diseases including polio and tetanus.

44. Edward has not been immunized for polio or tetanus or other communicable diseases.

45. After the parties separated in October 1993, Beatrice Hunt maintained custody of Edward until the Court granted temporary physical custody to Andrew Hunt on September 23, 1994.

46. While she had custody of Edward, Beatrice Hunt would often drive Edward around in her car very late at night to put him to sleep.

47. The parties employed various live-in nannies after Edward was born.

48. While in Beatrice Hunt's care, Edward was often dirty and unkempt and he was often wearing dirty clothing.

49. Edward continued using a pacifier at age four.

50. Edward continued wearing diapers and training pants at age four.

51. On one evening during the winter of 1993, Dr. Chapman, the family physician and a homeopathic practitioner, called Gale Hunt to express his concerns that Beatrice was driving around in the car with Edward and that Dr. Chapman believed Beatrice may have been suicidal.

52. While Edward was in Beatrice's custody, she would utilize various people unknown to Andrew to wait with Edward when Andrew was coming to pick up Edward for visitation.

53. While Beatrice had custody of Edward up to August, 1994, John and Janice Carney, who Beatrice used as care takers for Edward, became concerned about Beatrice's irrational behavior.

54. While in Beatrice's care, Edward suffered from diarrhea and problems with bowel control.

55. Since the Court granted Andrew temporary physical custody of Edward, Beatrice has not attempted to visit Edward, nor has she attempted to contact him via writing, telephone, or in any other manner, although she lives approximately two miles away from him.

56. Since January 1995, Andrew has been paying Beatrice $8,500 per month for living expenses, in addition to approximately $2,250 that Andrew has been paying for expenses related to the marital homestead in which Beatrice currently resides.

57. Since January 1995, Beatrice Hunt has saved over $90,000 which she currently maintains in her savings and checking accounts.

58. Since Edward has been in Andrew Hunt's custody, he has done extremely well in school and he interacts well with other children.

59. Andrew Hunt loves Edward very much and Edward has equally expressed his love for Andrew.

60. Edward is extremely happy living with his father.

61. Andrew Hunt never verbally or physically abused Beatrice Hunt.

62. Andrew Hunt never verbally or physically abused Edward Hunt.

63. Despite this Court's May 15, 1997 Order requiring both parties to submit to an independent psychological evaluation, Beatrice Hunt refused to submit to that psychological examination.

64. In accordance with this Court's May 15, 1997 Order, Andrew Hunt submitted to an independent psychological examination.

65. Dr. Benjamin D. Garber, the psychiatrist who performed the independent psychological evaluation of Andrew in June 1995, concluded that Andrew is an "emotionally healthy man" and that there was no evidence "to suggest that this gentlemen is psychologically impaired or unfit in any way."

66. Dr. Larry Larsen, the psychologist appointed by the Court to monitor Edward, found Edward to be doing well with his father. He found Edward to be very bright, outgoing and generally doing well. He found that Edward clearly loved his father and his father clearly

loved him. Dr. Larsen found no evidence of Edward being abused by his father.

. . .

Respectfully submitted,

Andrew M. Hunt,
By his attorneys,

MCLANE, GRAF, RAULERSON & MIDDLETON,
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APPENDIX B

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

Andrew M. Hunt

v.

Beatrice Juvanon DuVachat Hunt

No. 94-M-1624

FINAL DECREE OF DIVORCE

Master recommends:

A contested hearing on the merits in this case commenced on August 4, 1997, and concluded on August 7, 1997. The Plaintiff appeared with counsel and the Defendant appeared Pro Se, her last attorney having withdrawn on April 8, 1997. The minor child was represented by a Guardian ad Litem.

The Defendant is originally from France and the parties met in the State of Rhode Island in 1983. The Defendant at that time was a French teacher. The parties were married in Plaistow, New Hampshire, on July 30, 1985, in a civil ceremony. A later religious ceremony was held in Paris on August 24, 1985.

The Plaintiff is a great grandson of Captain Alfred E. Hunt who was a co-founder of a company which later became known as ALCOA. The plaintiff is a beneficiary of several trusts worth several million dollars and his total assets including the corpus of the several trusts now total approximately $34,000,000, an increase of approximately $14,000,000, since the date of the filing of the within libel on September 23, 1994.

The Defendant is the daughter of a university professor and is well-educated, having matriculated at the Sorbonne in France. She is fluent in several languages.

One child, a son Edward (d.o.b. 12/24/89) was born of the marriage. Edward remained in his mother's custody from the time of the parties' separation on October 11, 1993, until September 23, 1994, when Edward's physical custody was awarded to his father by ex-parte temporary orders. At that time the boy was 4 and 1/2 years of age, was still using a pacifier (exhibit 4) and had not been potty-trained. He remains unvaccinated to this date. The Defendant has had no contact with Edward for the past three years.

The evidence indicates that the Defendant has joined the Marian Order of Priests and spends considerable periods of time each day at church, in prayer. She does not believe in traditional medicine. She is an advocate of homeopathy and had spent some time studying the same at Northeastern University prior to the birth of Edward. Because of this belief, she strongly objected to a needed hernia operation for the Plaintiff. The Plaintiff eventually underwent surgery with consequences that need not be repeated here but are noted in Plaintiff's requests which are ruled upon below.

On July 29, 1985, immediately prior to the parties' civil ceremony, they entered into an ante-nuptial agreement (Plaintiff's exhibit 3). The Plaintiff testified that it was "very much protocol for an ante-nuptial agreement" in his family. The issue as to the validity of the ante-nuptial agreement was considered during the trial of the case in chief.

At the beginning of the trial, the Defendant refused to remain in the courtroom during the direct examination of the Plaintiff. She returned at the conclusion of his testimony and at that point refused to take the stand at the request of Plaintiff's counsel. She has not participated in the trial during any of the testimony involving the issue of custody. On the third day of trial Defendant requested and was allowed to cross-examine the Guardian ad Litem who had testified earlier in Defendant's absence. During the course of this cross-examination and upon inquiry from the Master, Defendant advised that she would need an additional two hours to complete the cross-examination. At this point, Defendant was advised that she herself would have to first take the stand. The hearing was adjourned for the day with Defendant advising the Court that she would consider taking the stand on day four of the trial. This she ultimately refused to do.

Witnesses, in addition to the Plaintiff and Guardian at Litem, consisted of the following:

A. Ms. Lee Whittle, Headmaster of the Merrimack Valley Montessori School;

B. Ms. Katherine Barber, a retired social worker who had provided therapy to the Defendant;

C. Ms. Catherine Olson, a nanny employed by the parties shortly before their separation;

D. Mr. John Carney, a friend of the Defendant who cared for the parties' child for approximately three days per week just prior to the Court granting the ex-parte order relative to the transfer of physical custody;

E. Mrs. Janice Carney, wife of John Carney;

F. Paul Twomey, Esquire, who represented the Defendant at the time of the execution of the ante-nuptial agreement;

G. Jack Kessler, Esquire, the Plaintiff's accountant;

H. Ms. Gale Hunt, Plaintiff's sister-in-law; and

I. Dr. Larry L. Larsen, clinical psychologist.

Based upon the evidence, the following orders are entered:

1. Decree of divorce. Grounds; irreconcilable differences which have caused the irremediable breakdown of the marriage.

2. Sole legal custody of the parties' minor child Edward (d.o.b. 12/24/89) is awarded to the Plaintiff. The award of sole legal custody is justified based upon the fact that the Defendant has not chosen to visit with the minor child for three years.

3. It shall be at the discretion of the Defendant whether she will apply to this Court for periods of physical visitation with Edward at some future date. In the event that such a petition for visitation is filed by the Defendant, the Guardian ad Litem shall immediately become re-involved in the case. Defendant shall first undergo such psychological or psychiatric evaluations as are directed by the Guardian ad Litem, the same to be considered by the Court.

If visitation is ordered by this Court, the same should initially commence on a supervised basis with supervision to be provided by Edward's psychologist.

4. Edward shall continue with such counseling by Dr. Larry Larsen as the doctor deems appropriate.

5. The Master finds the ante-nuptial agreement not to be enforceable. Although it passes the first two tests as set forth in *McFarlane vs. Rich,* 132 N.H. 608 at page 614, it does not pass the third test. It is found that the facts and circumstances of the parties have changed since the agreement was executed to the point that it would be unconscionable to enforce the agreement at this time. In this regard it is to be noted that Plaintiff's assets increased in value almost $24,000,000, from the date of signing the agreement until the date of trial.

Paragraph 7 of the agreement contemplated such changing circumstances and provided for at least an annual review with a "view to modification and amendment as may be considered mutually and necessary and appropriate." This was not done.

6. In consideration of the Plaintiff's significantly high income, there is no order for support entered against the Defendant.

The Plaintiff shall be allowed to claim the minor child Edward as a dependent for federal income tax purposes.

7. The Plaintiff shall be solely responsible for the payment of any expenses associated with private elementary and high school for the minor child. Additionally, the Plaintiff shall be solely responsible for all post-secondary educational expenses of Edward including the costs of obtaining a four year baccalaureate degree or the cost of any trade or vocational school.

Post-secondary educational expenses for Edward shall include tuition, room, board, books and personal living expenses.

8. Commencing the month following this decree becoming effective, the Plaintiff shall pay to the Defendant the sum of $7,250 per month as alimony. This requirement shall continue until a total of 120 consecutive monthly alimony payments have been made.

Said payments are to be included in the Defendant's gross income for federal income tax purposes and the Plaintiff shall be entitled to deduct said payments from his gross income for federal income tax purposes.

In entering this order, the Master has made the necessary findings as set forth in RSA 458:19.

9. The Plaintiff is to maintain medical and dental insurance coverage for the benefit of the Defendant until such times as she remarries or obtains full-time employment which provides adequate medical and dental insurance coverage for her at a reasonable cost.

The Defendant shall be responsible for payment of all expenses over and above that covered by medical and dental insurance.

10. The Plaintiff is to maintain medical and dental insurance for the benefit of the child as long as the child remains eligible for coverage under the policy terms. The Plaintiff shall be responsible for all uninsured medical and dental expenses of the child.

11. The Plaintiff is awarded:

A. The home located at 2 Old Village Road, Salem, New Hampshire, free, clear and disencumbered of any right, title or interest of the Defendant.

B. Any and all interest in the property located on Meadow Lane, Salem, New Hampshire, presently held in the name of his brother John Hunt. Said property is disencumbered of any claim of the Defendant.

C. Any and all interest in the Hunt summer home located in Weekapaug, Rhode Island, free, clear and disencumbered of any interest of the Defendant.

D. Any and all interest that he may have in the corporations or partnerships known as Fitness Equipment and Supply Company (FESCO), Computer Town of New Hampshire, Elmhurst Company, and the Hard Rock Cafe, free, clear and disencumbered of any right or title of the Defendant. The Plaintiff is to indemnify and hold the Defendant harmless from any debts or any other type of obligations with respect to these businesses.

E. His individual retirement account which is currently valued at approximately $6,362, free and clear of any interest of the Defendant.

F. The leased Lexus 450 SL automobile, disencumbered of any claim of the Defendant.

G. All other assets nor specifically allocated in this order, subject to the provisions of paragraph 13 below.

12. The Defendant is awarded:

A. The marital homestead located at 18 Lincoln Terrace, Salem, New Hampshire, free, clear and disencumbered of all right, title and interest of the Plaintiff.

The Plaintiff shall, within 60 days of the effective date of this decree, pay off the remaining mortgage loan on this property and shall execute a quitclaim deed to the Defendant conveying his interest therein to her.

B. Household furniture, furnishings and other items of personal property located at the former marital residence (18 Lincoln Terrace, Salem, New Hampshire) are awarded to the Defendant except for the personal property and family heirlooms to be identified by the Plaintiff during a walk through of the house. These items are awarded to the Plaintiff. In this regard, references made to the order of this Court dated May 9, 1996. Such items are to include those listed on schedule A which are attached to Plaintiff's Proposed Decree and together with other additional personal items such as clothing, sport equipment, personal records, photographs and personal papers.

C. Her savings account #27127533 at BankBoston valued as of May 9, 1997, at $17,203.85, her checking account #27127533 at BankBoston valued as of May 9, 1997, at $73,810.93, are to remain her separate property, free of any claim of the Plaintiff.

Additionally, she is awarded any other checking or savings account maintained by her in her own name individually.

D. The 1989 BMW 4-door Sedan and the 1988 Plymouth Voyager minivan are awarded to the Defendant, free of any claim of the Plaintiff.

E. All funds advanced by the Plaintiff to the Defendant to date for legal fees. These have been factored into this decree and are no longer an issue in this case.

13. The Defendant's remaining property interest in the marital estate shall be satisfied as follows. Commencing on April 1, 1998, and on the first day of April of each year thereafter through and including the year 2017, the Plaintiff shall pay to the Defendant the sum of $150,000.

14. Each party shall be responsible for all debts which have been incurred by that party in their respective names subsequent to the filing of the libel for divorce. Each party is to indemnify and hold the other party harmless with regard to such debts and neither party shall hereafter incur any debts for which the other party may be held liable.

15. The financial provisions of this order shall constitute a charge against each party's estate.

16. Neither party is to hereafter interfere with the personal liberty of the other party. They are to refrain from any unnecessary contact with each other and are to refrain from harassing, intimidating or threatening the other. Additionally, each party is prohibited from entering the other party's residence.

17. The within decree represents an award to the Plaintiff of the far greater portion of the marital assets. The same is justified based upon the far greater input of the Plaintiff into the acquisition, preservation and growth of marital assets together with the fact that the Plaintiff brought substantial assets into the marriage itself.

18. In the event of an appeal of this decree, temporary orders relative to alimony and other spousal support shall remain in effect pending said appeal.

The provisions of paragraph 2 of this decree relative to sole legal custody shall take effect immediately as a temporary order and shall remain in effect as a temporary order pending this decree becoming final.

19. Each party shall, within 30 days of the effective date of this decree, sign such papers as may be necessary to carry out the terms of this decree.

Plaintiff's Requests for Findings of Fact are GRANTED, other than number 22 which is neither granted nor denied.

Plaintiff's Requests for Rulings of Law are GRANTED, other than 8 and 9 which are DENIED and 7 and 12 which are GRANTED in part only.

October 17, 1997 /s/ Peter J. Bourque
DATE Peter J. Bourque, Master

Master's recommendation approved. Order entered in accordance therewith.

10/21/97 /s/ Walter Murphy
DATE Presiding Justice

JUDGMENT DAY: October 8, 1998
Plaintiff: R. David DePuy, Esq.
Plaintiff: Jeremy Walker, Esq.
Defendant: Pro Se
GAL: John P. Shyavitz, Esq.
ajc

APPENDIX C

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPERIOR COURT

NO 94-M-1624

Andrew Hunt

v.

Beatrice Juvanon DuVachat Hunt

DECREE

Master recommends that the following order be approved:

1. The parties shall agree upon a counselor for the minor child, and shall so notify the court, within thirty days. Failure to agree shall result in the Court choosing the counselor from among the following: Dr. Larsen; Dr. Newman or Dr. Marchessault.

2. With regard to the Motion to Enforce Visitation, the Defendant states that she feels short, supervised visits will have a detrimental effect upon the child and the child may be adversely affected when he returns home. Consequently, although the Court strongly encourages the Defendant to exercise her rights of visitation with the child, the Court cannot force her to do so. Consequently, the Motion to Enforce Visitation is denied.

3. This Court does not have authority to order immunization of the minor child. The dispute that has arisen with respect to this issue, clearly demonstrates that a final order of joint legal custody may not be in the child's best interests. Parties who are unable to agree on such a basic need with respect for their children, are not

prime candidates for such an order. The Court does have the power to grant the authority to one parent to have the child immunized. However, since these proceedings are in the "temporary" stages, the Court does not agree that it is in the child's best interest at this time to grant that authority to one party or to the other. Consequently, the motion to have the child immunized is denied. Either party may raise this issue with respect to his or her case regarding legal custody of the minor child.

DATE: April 4, 1995 /s/ Bruce F. DalPra
Bruce F. DalPra, Master

Master's recommendation approved. Order in accordance therewith.

DATE: 4/5/95 /s/ Kenneth McHugh
Presiding Justice